Supreme Court, U.S.
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NO. 88-2122

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

KATHLEEN MARIE EHRSAM,
Petitioner
v.
COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should consider the constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act based upon a Due Process challenge to the prosecutor's alleged unbridled discretion where petitioner did not assert the theory now presented to the only state appellate court to rule on the merits of petitioner's claims and where recent Supreme Court authority controls the issue?

2. Whether Pennsylvania's Mandatory Minimum Sentencing Act for certain crimes committed with firearms violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by limiting discretion in sentencing?

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MONWEALTH OF PENNSYLVANIA,
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ITION FOR WRIT OF CERTIORARI
SUPERIOR COURT OF PENNSYLVANIA

NDENT'S BRIEF IN OPPOSITION

ndent, Commonwealth of Penn- respectfully requests that t deny the petition for writ of i seeking review of the order ennsylvania Supreme Court deny- ioner's petition for Allowance . That order is set forth in dix to petitioner's brief at 35

OF JURISDICTION

tion of this Court is
U.S.C. § 1257(a) which
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highest state court in
on could be had." Ap-
ht in noncapital crimi-
nnsylvania are heard by
Superior Court, an in-
llate court. See 42
Ann. § 742 (Purdon
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See 42 Pa.Cons.Stat.Ann.
81). A decision not to
of appeal is not a deci-
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ourt's order in this case.[2]

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cf. R.J. Reynolds Tobacco Co.
County, 479 U.S. 130, 138
ismissal of appeal by North
Supreme Court does constitute
on merits permitting review
57(a).

rder of February 2, 1987, the
ia Supreme Court denied
's first Petition for
of Appeal, thus declining to
its discretion to review the
opinion of the intermediate
court as entered on July 9,
itioner received permission to
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sylvania's Post Conviction
ct. 42 Pa.Cons.Stat.Ann. §§
seq. (Purdon 1982) By Order of
1989, the Pennsylvania Supreme
ied Petitioner's second Peti-
Allowance of Appeal, again de-
o exercise its discretion to
e Order and Opinion of the
ia Superior Court entered July

the judgment reviewable under 28 U.S.C. § 1257(a).[3] For this reason, the petition for certiorari should have been sought from the Pennsylvania Superior Court in the case of Commonwealth v. Ehrsam, 355 Pa.Super. 40, 512 A.2d 1199, 1203-1204 (1986). It was not. Thus, the petition should be denied for want of jurisdiction. See R.J. Reynolds Tobacco Co. v. Durham Company, 479 U.S. 130, 139 (1986) (Dismissing appeal from court which was not the "highest court" for want of jurisdiction.)

A second jurisdictional defect is present. This Court is without juris-

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[3]Sullivan v. Texas, 207 U.S. 416 (1908); American Ry. Exp. Co. v. Levee, 263 U.S. 19, 20-21 (1923); Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160 (1954); Interstate Circuit, Inc., v. Dallas, 390 U.S. 676, 678 n.1 (1968).

diction to grant "review" where the petitioner did not present her theory to the "highest court" in the state to rule on the merits.

Of the two claims of Fourteenth Amendment violations presented by petitioner for review, only the question of whether Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa.Cons.Stat.Ann. § 9712 (Purdon 1982), (hereinafter "Act") violates the Due Process Clause guarantees of the Fourteenth Amendment by impermissibly precluding individualized sentencing has been raised in and considered by the highest Pennsylvania court to review petitioner's case.

The issue of whether the prosecutor's alleged unbridled discretion in determining which defendants will be subject to the mandatory penalty works a constitutional violation was not raised in the Pennsylvania Superior Court as a

claim of unconstitutionality based upon due process. Rather, petitioner relied upon a violation of the principle of separation of powers. Consequently, the Pennsylvania Superior Court addressed the issue of the prosecutor's role in implementing the statute as it was raised--in terms of the principle of separation of powers. (See Pet. App. 28a-29a) The Pennsylvania Superior Court never addressed the issue in terms of a due process violation of the Fourteenth Amendment, as this issue was never presented to the court.

This Court will not decide a federal constitutional issue raised before it for the first time. Cardinale v. Louisiana, 394 U.S. 437 (1969). Nor will this Court address a constitutional issue presented on a new legal theory. Webb v. Webb, 451 U.S. 493, 496-98 (1981); Picard v. Connor, 404 U.S. 270,

278 (1971). Accordingly, this Court has no jurisdiction to consider whether the Due Process Clause of the Fourteenth Amendment is violated by the requirement that the mandatory minimum sentencing provisions of 42 Pa.Cons.Stat. Ann. § 9712 (Purdon 1982) are inapplicable absent the filing of a notice by the prosecution of its intention to proceed under the provision.

STATEMENT OF THE CASE

A. Factual History

Respondent relies upon the Pennsylvania Superior Court's statement of the facts in this case. Commonwealth v. Ehrsam, 355 Pa.Super. 40, 48-50, 512 A.2d 1199, 1203-1204 (1986), Pet. App. 13a-15a.

B. Procedural History In The Lower Courts

With one exception, respondent accepts the petitioner's procedural history.

Petitioner mischaracterizes her presentation of issues to the Superior Court of Pennsylvania and the court's action thereon. She states that the due process challenge was "presented on appeal and decided by the Superior Court". cert. pet. at p. 16. This statement is true, but incomplete and hence, misleading.

On direct appeal to the Superior Court of Pennsylvania, petitioner argued that the prosecutor's alleged unbridled discretion under the statute violated the principle of separation of powers. She chose not to raise any due process challenge to the prosecutor's role under the statute; thus, waiving the argument of due process violations. Kimmel v. Somerset County Commissioners, 460 Pa. 381, 333 A.2d 777 (1975) (failure to pursue an issue on appeal is as much a waiver as is the failure to initially raise the issue). Accord Commonwealth v. Hernandez, 339 Pa.Super. 32, 39 n. 4, 488 A.2d 293, 300 n.4 (1985). The court, obviously, did not address this issue since it was not presented.

C. Procedural History in the Supreme Court

The petition for writ of certioari was filed on August 15, 1989 and a copy was served on the Pennsylvania Attorney

General. The petition presents a constitutional challenge to a state statute. The Office of Attorney General initially deferred to the Bucks County District Attorney's Office for the filing of a response. By letter dated August 15, 1989, this Court directed that the Attorney General file a response to the petition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Allegations That Pennsylvania's Mandatory Minimum Sentencing Act Violates The Due Process Clause Of The Fourteenth Amendment By Placing Unbridled Discretion In The Hands Of The Prosecution Were Never Presented By Petitioner To Or Ruled Upon By The Highest State Court To Address The Merits Of This Case. In Any Event, The Discretion Invested In The Prosecutor To File Notice Under The Act Is Not Different From The Discretion Invested In The Prosecutor At Every Stage Of A Criminal Prosecution, And Clearly Did Not Deny Petitioner Due Process.

This Court will not consider federal issues not presented and ruled upon below. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). The rationale for this rule[4] is based on principles of feder-

[4] "In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § (footnote continued on next page)

alism as well as judicial economy. Absent consideration of the issue below, the Court is without the benefit of the lower court's reasoning. Here, since the highest court to rule on the merits was not presented with a due process challenge to the prosecutor's role under the Act[5] that issue is not properly

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[4](continued) 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 U.S. 92 (1966), they should be given the first opportunity to consider them." Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

[5]This issue was presented to the trial court. Initial appellate counsel (footnote continued on next page)

before the Court.

In any event, the Act is not invalid on this ground. Petitioner asks for review of a claim that the Pennsylvania Mandatory Minimum Sentencing Act, by placing on the prosecution the duty to serve a defendant with notice of its intention to seek a sentence under the Act, gives the prosecution unbridled discretion and thus denies petitioners due process. Contrary to petitioner's assertion that this question was left open by United States v. Batchelder, 442 U.S. 114 (1979), Batchelder controls.

In Batchelder, this Court held that

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[5](continued) waived the issue. No allegation of ineffective assistance of counsel was made by petitioner as to the appellate counsel who handled her appeal as of right. Rather, her post conviction relief petition alleged that counsel who prepared the petition for allowance of appeal to the Pennsylvania Supreme Court was ineffective.

due process permits the prosecutor to choose between bringing charges under two statutes with identical elements but different penalties. In the unanimous opinion, Mr. Justice Marshall noted that the prosecutor's discretion in choosing between the two statutes was not unfettered, but was in fact subject to constitutional constraints against invidious selectivity in enforcement. United States v. Batchelder, 442 U.S. at 124-25. Batchelder fully applies here, the prosecutor's responsibility to file notice to proceed under the Act is no different from the responsibility in Batchelder of choosing what crime to charge. Here the prosecutor's exercise of responsibility may remove discretion from the sentencing court as to the minimum term imposable. This does not distinguish this case from Batchelder, where the prosecutor's choice affected

the court's discretion as to the maximum term. See Martin v. Parratt, 549 F.2d 50 (8th Cir. 1977). Since this claim is directly controlled by authority that petitioner does not challenge, the petition for writ of certiorari should be denied.

II. Pennsylvania's Mandatory Minimum Sentencing Act For Certain Crimes Committed With Firearms Does Not Violate The Due Process Clause Of The Fourteenth Amendment By Limiting Discretion In Sentencing

Pennsylvania's Superior Court determined that Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa.Cons.Stat. Ann. § 9712, which requires the imposition of a five year minimum term of imprisonment upon conviction of certain offenses committed with the visible possession of a firearm, does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by impermissibly precluding individualized sentencing. This decision does not conflict with applicable decisions of this Court. The instant petition for a writ of certiorari should be denied.

It is well-established that due process considerations are applicable to the sentencing process. Gardner v. Florida, 430 U.S. 349 (1977). As this Court has explained, a determination that due process is applicable does not end the inquiry.

> Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation to authority that due process is flexible and calls for such procedural safeguards as the particular situation demands. . . .Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Further guidance as to the practical meaning of "due process" comes from Wolff v. McDonald, 418 U.S. 539

(1974), wherein this Court said: "The touchstone of due process is protection of the individual against arbitrary action of government." Id, at 558, The Act, designed to serve a compelling state interest, is a means reasonably related to its goals, and does not subject individual defendants to arbitrary government action. Accordingly, it is not violative of the due process provisions of the Fourteenth Amendment.

Pennsylvania's Supreme Court has determined that through the Act "[t]he Commonwealth seeks to protect the public from armed criminals and to deter violent crime and the illegal use of firearms generally, as well as to vindicate its interest in punishing those who commit serious crimes with guns." Commonwealth v. Wright, 508 Pa. 25, 41, 494 A.2d 354, 362 (1985) aff'd sub nom. McMillan v. Pennsylvania, 477 U.S. 79

(1986) (proof of visible possession of a firearm by a preponderance of the evidence not violative of due process). Thus any constitutional analysis of the statute challenged by petitioner must begin with a recognition that the statute serves a compelling societal interest.

Petitioner's argument that the Act impermissibly limits the discretion of the sentencing judge overlooks well-established state and federal case law. "Although the judiciary imposes sentences upon conviction, the fixing of penalties for crimes is a task for the legislature, and, as one of its options, the legislature may prescribe a mandatory minimum term of imprisonment." Commonwealth v. Cooke, 342 Pa.Super. 58, 69, 492 A.2d 63, 69 (1985) (mandatory five year minimum sentence under the Act does not violate due process by removing

discretion of sentencing judge to sentence defendant to lesser term); See also Commonwealth v. Hernandez, 339 Pa.Super. 32, 39, 488 A.2d 293, 297 (1985) (mandatory sentencing provisions of Pennsylvania's drunk driving law upheld against a variety of constitutional attacks). The Superior Court's decision properly followed this unbroken line of Pennsylvania authorities.[6] Commonwealth v. Ehrsam, 355 Pa.Super. 40, 60-61, 512 A.2d 1199, 1203-1204 (1986) Pet. App. 12a, 28a-29a.

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[6]Petitioner contends that under Commonwealth v. Martin, 466 Pa. 188, 132, 351 A.2d 650 (1976), individualized sentencing is required in all cases in Pennsylvania. This position is untenable. It ignores the fact that the Pennsylvania Supreme Court has already upheld this Act's constitutionality, Commonwealth v. Wright, supra) as well as the constitutionality of more onerous mandatory sentence provisions. (Commonwealth v. Sourbeer, 492 Pa. (footnote continued on next page)

The Pennsylvania Superior Court's approach squares fully with federal case law. The authority to define and fix the punishment for felony convictions is "purely a matter of legislative prerogative." Rummel v. Estelle, 445 U.S. 263, 274, (1980) (upholding mandatory life sentence against challenges under the Eighth and Fourteenth Amendments). Thus, although a disproportionate mandatory sentence may in extreme cases violate the Eighth Amendment, Solem v. Helm, 463 U.S. 277, 288-90, (1983); Rummel, 445 U.S. at 274 n. 11, due process is not violated merely because a statute divests the trial judge of discretion to sentence as he might

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[6](continued) 17, 422 A.2d 116 (1980) (mandatory life for first degree murder upheld); Commonwealth v. Cornish, 471 Pa. 256, 261, 370 A.2d 291, 293 (1977) (mandatory life for felony murder upheld).

wish.[7] See McMillan v. Pennsylvania, 477 U.S. 79, 92 (1986).

In non-death penalty cases, "the prevailing practice of individualizing sentencing determinations generally reflects simply enlighted policy rather than a constitutional imperative." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). "Sentencing in noncapital

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[7]That this Court should use the instant case as a vehicle to resolve the validity of federal sentencing guidelines is an absurd proposition. As conceded by petitioner (cert. pet. at 24), the issues here presented differ from those presented in the debate over federal guidelines. Though not mentioned by petitioner, one of the issues presented by the federal guidelines has already been resolved by this Court. Mistretta v. United States, ___ U.S. _____, 109 S.Ct. 647 (1989) (sentencing guidelines upheld against constitutional challenges based upon separation of powers principle and alleged excessive delegation of legislative power.

cases presents no comparable problems. We emphasize that in dealing with standards for imposition of the death sentence we intimate no view regarding the authority of a State or of the Congress to fix mandatory, minimum sentences for noncapital crimes." Lockett v. Ohio, 438 U.S. 586, 605, n. 13 (1977) (Op. of Burger, C.J.)

The Act permits sentencing discretion within the range set by the legislature with special consideration given to one fact, possession of a firearm. "Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, e.g., Profitt v. Florida, 428 U.S. 242 (1976)." McMillan v. Pennsylvania, 477 U.S. 79, 92 (1986).

Pennsylvania's Mandatory Minimum Sentencing Act does nothing more than mandate that the sentencing court consider a particular fact and, upon a finding of that fact, impose a penalty within a circumscribed range. Further, the imposition of a mandatory five year minimum sentence for either aggravated assault or voluntary manslaughter offenses results in a sentence no greater than the longest minimum sentence which might be legally imposed, had visible possession of a firearm not been a sentencing factor.[8]

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[8]Of those offenses subject to the Act, all except aggravated assault, as specified in the Act, and voluntary manslaughter are classified as felonies of the first degree. Under Pennsylvania law a person convicted of a first degree felony may be sentenced to a maximum term of imprisonment of twenty years. 18 Pa.Cons.Stat.Ann. § 1106. As, in Pennsylvania, a minimum sentence "shall not exceed one-half of the maximum (footnote continued on next page)

As the Pennsylvania Supreme Court found:

> . . .[R]egardless of whether section 9712 is invoked a defendant convicted of one of the crimes listed therein could be sentenced to a minimum sentence of five (5) years.
>
> The effect of section 9712 is merely to limit the discretion of the sentencing court in the selection of a minimum sentence where it is determined that the defendant visibly posessed a firearm during the commission of a crime. The defendant has no cognizable right to leniency. Thus although a finding that

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[8](continued) sentence imposed," 42 Pa.Cons.Stat.Ann. § 9756(b), it is possible that the minimum sentence for a first degree felony could exceed five years, even without the application of the mandatory minimum sentence provisions. Aggravated assault, in the degree specified in the Sentencing Act, and voluntary manslaughter are each classified as felonies of the second degree for which the maximum sentence is ten years. 18 Pa.Cons.Stat.Ann. § 1106. The longest minimum sentence possible is five years, one-half the allowable maximum.

> this particular sentencing factor is present may have serious consequences for the defendant, we do not believe that a defendant subject to a section 9712 proceeding is in a position significantly distinguishable from that of other convicted defendants during the sentencing phase.

Commonwealth v. Wright, 508 Pa. 25, 32-33, 40, 494 A.2d 354, 362 (1985).

This Court has already adopted the Pennsylvania Supreme Court's assessment of the effect of Section 9712, writing in McMillan v. Pennsylvania:

> Section 9712 neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. Section 9712 "ups the ante" for the defendant only by raising to five years the minimum sentence which may be imposed within the statutory plan. . . .

> . . . .The Pennsylvania Legislature. . . simply took one factor that has always been considered by sentencing courts to bear on punishment--the instrumentality used in committing a violent felony--and dictated the precise weight to be given that factor if the instrumentality is a firearm. . . .

McMillan v. Pennsylvania, 477 U.S. at 87-90 (emphasis supplied).

While this Court has recognized that due process is applicable to the sentencing process, Gardner v. Florida, 430 U.S. 349 (1977), this Court has also clearly articulated that "the defendant has no substantive right to a particular sentence within the range authorized by statute." Id. at 358.

This Court has already signaled, admittedly in dicta, the unlikelihood of its finding the Mandatory Minimum Sentencing Act violative of the Due Process

Clause on the grounds of impermissible limitations on the sentencing judge's discretion. Writing in McMillan v. Pennsylvania, supra, this Court said:

> Petitioners (in McMillan) apparently concede that Pennsylvania's scheme would pass constitutional muster if only it did not remove the sentencing court's discretion, i.e., if the legislature had simply directed the court to consider visible possession in passing sentence. . . . We have some difficulty fathoming why the due-process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance.

Id. at 92 (emphasis in the original)

The disposition of this petition, like McMillan v. Pennsylvania, supra, is controlled by Patterson v. New York, 432 U.S. 197 (1977). The premise of Patterson, as set forth by this Court in McMillan, supra, is this:

> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government. Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states". . . .
>
> . . .Patterson teaches that we should hesitate to conclude due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.

McMillan v. Pennsylvania, 477 U.S. 79, 85-86 (1986), quoting Speiser v. Randall, 357 U.S. 513, 523 (1958).

As Pennsylvania's Mandatory Minimum Sentencing Act comports with federal standards of due process, this Court should follow the teaching of Patterson and deny the instant petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully Submitted,

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